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No. 88-938

In The

Supreme Court of the United States

October Term, 1988

The Boeing Company, Inc.,
Petitioner,

v.

United States Of America,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER THE BOEING COMPANY

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QUESTIONS PRESENTED

1. Whether the court of appeals misconstrued the requirements of 18 U.S.C. § 209 and the clearly erroneous standard of Federal Rule Civil Procedure 52(a) in reversing the trial court's factual findings regarding Petitioner's intent.

2. Whether injury can be presumed from the mere fact of a severance payment in order to support a federal common law tort claim derived from the standards of a criminal conflict of interest statute, 18 U.S.C. § 209.

3. Whether disclosure of severance payments to government officials and their acquiescence in them negate a federal common law tort claim predicated on 18 U.S.C. § 209.

LIST OF PARTIES

The defendants in the district court and appellees in the court of appeals were petitioner The Boeing Company and petitioners Lawrence H. Crandon, Thomas K. Jones, Harold Kitson, Jr., Melvyn R. Paisley, and Herbert A. Reynolds. The United States was the plaintiff in the district court and the appellant in the court of appeals.

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The opinion of the court of appeals (Pet., App. A) is reported at 845 F.2d 476. The opinion of the district court (Pet., App. B) is reported at 653 F. Supp. 1381.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1988. A timely petition for rehearing with a suggestion of rehearing *en banc* (Pet., App. C) was denied on September 7, 1988. A timely petition for a writ of certiorari was filed on December 6, 1988. On April 3, 1989, this Court granted certiorari. The Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

This case, with respect to Boeing, is a federal common law tort action predicated on the standard of a criminal statute, 18 U.S.C. § 209. Section 209, which is set forth in full at Appendix D in Boeing's petition for a writ of certiorari, provides in relevant part:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States . . .; or
>
> Whoever . . . pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under

circumstances which would makes its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year; or both.

STATEMENT OF THE CASE

Nature of the Case

The United States brought this civil action against The Boeing Company and five of its former employees under a novel legal theory derived from a criminal statute, 18 U.S.C. § 209. The government's claims are based on severance payments that Boeing made to these five employees prior to their entry into government service. According to the government, the severance payments violated a standard of conduct embodied in § 209, regardless of the parties' intent underlying the payments and regardless of whether the payments caused any injury to the government.

This is a case of first impression. Although there is general precedent for the government to bring civil actions based on criminal violations, the government has never brought criminal charges for the granting or receipt of severance payments, under 18 U.S.C. § 209 or any other statute.[1] Section 209 has been sparingly used by the government as a tool of criminal enforcement. The only reported cases, *United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1979) and *United States v. Raborn*, 575 F.2d 688 (9th Cir. 1978), pro-

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[1] There was no prior conviction under § 209 in this case. The Criminal Division of the Department of Justice, after investigation, declined to prosecute.

vide no precedent for the use of § 209 in the unlikely setting of corporate severance payments.[2]

Nor has the government ever previously brought a civil suit under 18 U.S.C. § 209 or any other theory challenging severance payments. Indeed, the government's attempt to use this case as a means to outlaw the common practice of severance payments is at odds with the policy of the Defense Department which expressly recognizes and endorses the practice of making such payments.[3]

Statement of Facts

1. Boeing's Severance Pay Practice

At the beginning of the Reagan administration, the government recruited aerospace experts from Boeing and other members of the industry to fill various positions relating to the national defense. Between May 1981 and July 1982, five Boeing employees—T.K. Jones, Melvyn R. Paisley, Herbert A. Reynolds, Law-

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[2] *United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1979) involved a government official whose expenses to Ireland to promote a private insurance venture were paid by his business associates. In reversing a conviction under § 209, the D.C. Circuit held that Muntain, being on leave from his government job, could not have been compensated for his government service since the payment was for private business services. *Id.* at 970. The Ninth Circuit in *United States v. Raborn*, 575 F.2d 688, 689-90 (1978), held that § 209 was not a lesser included offense of bribery of a postal service employee.

[3] When Boeing made the payments, section 15-205.39 of the Defense Acquisition Regulations expressly permitted contractors to charge severance payments as general and administrative overhead costs. The current provision of the Federal Acquisition Regulations relating to severance payments is found at 48 C.F.R. 31.205-6(g) (1988).

rence H. Crandon, and Harold Kitson, Jr.—retired or resigned from Boeing to enter federal service at the urging of high level representatives of the government. To sever all ties and compensate for lost benefits, Boeing made a severance payment to each of these five employees prior to the termination of his employment relationship with Boeing and before he began work for the government.[4]

Boeing has followed a longstanding practice of making severance payments to employees who later enter government service. This practice has served two purposes. First, it ensured the severance of all employment and financial ties between Boeing and the

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[4] (1) T.K. Jones became the Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces on June 1, 1981. He was recruited for this position by the Under Secretary of Defense for Research and Engineering. On the day of his resignation from Boeing, May 19, 1981, he received a severance payment of $132,000; (2) Melvyn R. Paisley was recruited for government service by the Secretary of the Navy to become Assistant Secretary of the Navy for Research, Engineering and Systems. When Mr. Paisley retired from Boeing on October 1, 1981, he received a severance payment of $183,000; (3) Herbert A. Reynolds became Deputy Director of Space and Intelligence Policy on October 4, 1981. When Mr. Reynolds resigned from Boeing on July 22, 1981, he received a severance payment of $80,000; (4) Harold Kitson, Jr. retired from Boeing on July 31, 1982, to accept a position as Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence. He received a severance payment of $50,000 on the date of his retirement; and (5) Lawrence H. Crandon was requested by Assistant Deputy Under Secretary of Defense for Communications, Command and Control to join the NATO Air Command and Control System team in Brussels, Belgium, as a computer scientist and communications, command and control engineer. Mr. Crandon resigned from Boeing on March 5, 1982, and received a severance payment of $40,000.

employee to avoid any potential for a conflict of interest. Second, it encouraged public service by decreasing the financial penalties associated with moving from the private to the public sector. As John Lehman, then Secretary of the Navy and the superior of two of the individual defendants, testified at trial, severance payments such as the ones made here encourage individuals to enter public service by releasing the "golden handcuffs" of the company, that is, the "financial incentives that are designed to prevent [middle management] from leaving the company." JA 228 (CA JA 1073). Over the past twenty years, Boeing made twenty-one severance payments to employees who left the Company to enter public service.

Boeing's practice of fostering public service has not been limited to the federal government. Historically, Boeing has encouraged its employees to participate in many areas of the public sector, including state and local government and academic and charitable institutions. JA 44, 290-92 (CA JA 441, 646-48). Unlike federal employment, other types of public service have not required a complete severance from private employment. Boeing often continued ongoing financial arrangements with its employees who accepted these types of positions, including paid leave, retained benefits or partial salary during the employee's leave of absence from the Company. JA 44, 405-406, 291 (CA JA 441, 547-48, 647). Of course, when severance of the employment relationship with its attendant financial penalties was not required, no severance payment was made. JA 44, 291 (CA JA 441, 647).

By contrast, Boeing recognized that when its employees accepted positions in federal government, an absolute and total severance from the Company was

required. Boeing's practice reflected this requirement, and the Company made severance payments to these individuals to mitigate financial penalties of terminating employment and to sever completely all employment and financial ties between the Company and the employee. After termination, it was understood that employees would have no continuing interest in any Boeing employment or retirement program, would own no Boeing stock or stock options, and had no rights or obligations with respect to possible re-employment with the Company. In short, severance payments represented a complete cash-out of all benefits and an absolute and total severance from the Company. JA 44 (CA JA 441).

2. Disclosures To The Government

Boeing's practice of making severance payments was no secret to the government. Over the past two decades, Boeing has consulted with the general counsels of the recruiting agencies on at least three occasions to ensure that the appropriate government officials were aware of, and did not object to, the Company's practice. Pet., App. B, 18a. On each of these occasions, the general counsels of NASA, the Air Force and the Department of Defense approved the making of the payments. At no time did the government object to this practice despite actual knowledge; and on at least one occasion, it informed Boeing in writing that a proposed severance payment was in compliance with federal conflict of interest statutes. JA 552-53 (CA JA 162-63).[5]

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[5] The Acting General Counsel of the Department of Defense stated in a 1968 letter that the proposed severance payment to a Boeing employee was in "compliance with the so-called conflict

Moreover, Boeing routinely charged severance payments, including the five payments at issue here, to its general and administration overhead account pursuant to Defense Acquisition Regulations that explicitly govern the cost allowability of employee severance payments. Like all of Boeing's overhead costs, these payments were routinely audited by the Defense Contract Audit Agency ("DCAA") in setting the Company's overhead rates.

Aside from the routine disclosures made by Boeing, the individual defendants also disclosed the fact and amount of the severance payments in Financial Disclosure Reports filed with the government. Mr. Paisley and Mr. Jones personally discussed the propriety of the severance payments and the manner of their disclosure with attorneys from the Office of the General Counsel of the Department of Defense and the Navy. Pet., App. B, 21a, ¶ 26. They were advised to aggregate all forms of earned and non-investment income received from Boeing, including the severance payments, on their disclosure forms in accordance

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of interests statutes. . . . " JA 553 (CA JA 162). Boeing's letter to the Department of Defense seeking this response specifically referenced 18 U.S.C. § 209. JA 548 (CA JA 158). A subsequent letter in connection with another Boeing employee's joining the Air Force in 1973 stated that the severance payment was based on various factors, "including his past service with the Company and a rough estimate of the differential of overall benefits that might accrue to [the employee] if he remained with the Boeing Company over the next three and one-half years as compared with his taking this possible position with the Air Force." JA 542 (CA JA 152). As with the other letters, the inquiry was made "so that if there is any question regarding the propriety or legality of the proposed termination settlement the matter can be resolved before any decision is made." *Id.*

with the government's instructions for completing the forms. JA 175-76, 212-13 (CA JA 1037, 1062-63).[6]

3. Calculation Of The Severance Payments

As a general rule, Boeing used the following procedure in calculating severance payments. First, the industrial relations staff of the operating division at which the departing employee was employed prepared a memorandum that recommended an appropriate severance payment. JA 332-36 (CA JA 552-54). The proposed amount of the payment was derived by staff of the operating division who performed various calculations in an effort to develop a proposal that was fair, reasonable and consistent with past practice. JA 329-31, 299 (CA JA 595, 654). Some of the calculations contained prospective elements, such as the difference in salary and benefits between Boeing and government employment; others did not. For any given severance payment, several calculations were made often resulting in different amounts. *E.g.*, JA Tab 2, Exhibits Lodged with Court; 351-56 (CA JA 52-53, 767-72).

These preliminary calculations were then reviewed by mid-level managers. The ultimate decision to make

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[6] Pursuant to the Ethics in Government Act, Messrs. Jones, Paisley, Reynolds, and Kitson each submitted a required "Form SF-278 Financial Disclosure Report" to the appropriate Defense Department "Designated Agency Ethics Official." JA Tabs 4, 5, 21-25, Exhibits Lodged with Court (CA JA 116-50). Mr. Crandon, who was hired as a GS-15 level employee, was not required to complete an SF-278 Financial Disclosure Report. JA 34, ¶ 91 (CA JA 338, ¶ 91). The government's express instructions for completing the SF-278 Financial Disclosure Forms required the reporting employee to aggregate all forms of earned and non-investment income received from a single source. 32 C.F.R. § 40.10(b).

a severance payment, however, was in all instances made at the highest levels of corporate management by the Chairman and Chief Executive Officer, who at the time was Mr. T.A. Wilson, or, in his absence, by the President of The Boeing Company. JA 45, 412-13, 287, 294-95 (CA JA 442, 553, 644, 650). Mr. Wilson personally approved four of the five payments here at issue. Mr. Wilson's decision reflected his personal judgment as to an appropriate payment. In at least one instance, he reduced the amount of the payment. JA 293-94 (CA JA 649). In each case, Mr. Wilson based his judgment upon the departing employee's past service to the Company and his own sense of the financial settlement appropriate to sever completely and absolutely all ties between the individual and the Company. JA 45 (CA JA 442). Mr. Wilson did not rely upon any formula that may have been used to prepare the recommendations, and he was in fact unaware of the specifics of such formulas, including the criteria used to calculate the payments and the actual calculations themselves. Pet., App. B, 20a, ¶ 20; JA 45, 298-300 (CA JA 442, 653-54).

4. The Government's Decision to Sue

Consistent with its past practice, Boeing included the amounts of the five severance payments in the general and administrative overhead accounts of Boeing Aerospace Company. In performing its routine audit function in late 1981, the DCAA questioned the allowability of three of the five severance payments at issue and subsequently reported them to the Department of Defense contracting officer. The matter was referred to the Department of Justice on July 14, 1982. In 1985 upon threat of immediate suit, Boeing executed an agreement that tolled the statute

of limitations as of March 25, 1985, but expressly preserved the defense if, as the district court later found, the statute had run prior to that date. Pet., App. B, 24a.

On July 22, 1986, the Department of Justice instituted a civil action against Boeing and five former employees alleging common law violations of the standard of conduct set forth in § 209. The government's claim against Boeing is based on an alleged common law tort of inducing a breach of fiduciary duty in violation of a standard of conduct derived from § 209. The complaint charges that "Boeing created a conflict of interest situation which induced the breach of the fiduciary duty of undivided loyalty which each individual defendant owed to the United States, as measured by 18 U.S.C. § 209 and/or the common law." JA 12 (Complaint, ¶ 16).

The government's claim against the individuals, by contrast, is based on a quasi-contract theory for breach of the duty of loyalty owed by the individuals to the government. Pet., App. B, 24a. The government stipulated that no actual conflict of interest occurred, but claimed that the payments created an appearance of a conflict of interest. As damages, the government sought to recover the total amount of the severance payments plus interest from both Boeing and the individuals.

Decisions Below

In a bench trial, the United States District Court for the Eastern District of Virginia granted judgment for the defendants on all issues. The district court's ruling was based on 36 findings of fact and eight conclusions of law made after hearing the testimony

of four witnesses and evaluating the depositions of ten witnesses.[7] The following findings of fact and conclusions of law were key:

(1) Intent is required under § 209. The severance payments were not intended by Boeing as a supplementation of the individuals' government salaries or as compensation for their government services. Pet., App. B, 20a, ¶ 22;

(2) The use of an employee's salary loss in calculating severance payments does not equate to a salary supplement because "the use of salary figures and benefits are an accurate measure of past contributions" to the employer, and Boeing's payments were made "to sever the relationship with these employees based on past performance and accumulated benefits." *Id.* at 26a;

(3) The severance payments were not contingent upon the individuals entering government service, the position assumed in government, their remaining in government for any length

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[7] The district court heard testimony from John F. Lehman, Secretary of the Navy, Melvyn Paisley, T.K. Jones and James N. Heyel; and had before it the depositions of Charles P. Hagberg, H.K. Hebeler, T.A. Wilson, S.M. Little, Jr., Mark K. Miller, T.K. Jones, Melvyn Paisley, Harold Kitson, Jr., and Lawrence H. Crandon, as well as the deposition of the United States. Pet., App. A, 13a, n.1. Undersecretary of Defense Richard D. DeLaur provided a declaration that is part of the record, but he was excused as a witness on the day of trial. Deputy Undersecretary of Defense General Richard G. Stilwell and Admiral Robert E. Kirksey, Director of Command and Control, Space, also provided declarations that are part of the record. JA 50, 79, 62 (CA JA 402, 426, 436).

of time, or their returning to Boeing. *Id.* at 19a, ¶ 17;

(4) The severance payments were timely disclosed to the government and therefore did not violate common law agency principles which prohibit only secret profits. *Id.* at 27a;

(5) The government supervisors of each of the individuals were and are fully satisfied that the individuals capably and honorably performed their public duties without bias and with independence and impartiality and have never engaged in or otherwise participated in a conflict of interest. *Id.* at 21a, ¶ 23;

(6) The severance payments created neither the appearance of nor an actual conflict of interest because none of the individuals was in a position to—nor in fact did—render preferential treatment to Boeing. *Id.* at 27a-28a; and

(7) The government's claims against Boeing for the first four severance payments were barred by the three-year statute of limitations, 28 U.S.C. § 2415(b). *Id.* at 28a-29a.

On appeal, the United States Court of Appeals for the Fourth Circuit, in a divided decision, affirmed in part and reversed in part. The Fourth Circuit held that although § 209 requires intent, the district court's finding that Boeing did not intend the payments as compensation for the individuals' government service was clearly erroneous. Pet., App. A, 8a. Noting that the district court's finding was "based largely on statements by the individual defendants and others at Boeing," the court nevertheless reversed that find-

ing based on "[o]ther evidence in the record. . . . " *Id.* at 8a. This "other evidence" consists of inferences drawn by the court from a limited number of factual circumstances surrounding the payments, including the factors used in calculating the preliminary recommendations for the severance payments. *Id.*

The court also reversed the district court's holding that the government had suffered no injury because the severance payments created neither the appearance of nor an actual conflict of interest. *Id.* at 9a. According to the majority, the mere fact of the severance payments created the appearance of a conflict which the court deemed to be sufficient injury for the government to recover damages. *Id.* at 8a, 9a.

The court also held that the individuals' disclosures of the payments did not negate any potential conflict because "a violation of the standards of § 209 . . . is not limited to secret compensation." *Id.* at 9a. The court alternatively held that even if secrecy or nondisclosure were an element of the cause of action, the disclosures made by the individuals were insufficient. *Id.*

Finally, the court of appeals affirmed the district court's holding that the government's claims for four of the five severance payments were barred by the applicable statute of limitations, 28 U.S.C. § 2415(b). *Id.* at 11a.

Judge Hall concurred in the majority's opinion regarding statute of limitations issues, but dissented from the majority's reversal of the district court's factual finding that the severance payments were not intended as compensation for government service. *Id.* at 13a. Judge Hall observed that the issue of intent

is "a factual determination purely within the province of the district court" and that the district court reached its finding "after hearing substantial testimony and weighing the credibility of numerous witnesses." *Id.* In Judge Hall's view, this finding could not be clearly erroneous because it was supported by substantial testimony, the credibility of which was weighed by the district court. *Id.* at 13a, 14a.

Judge Hall also concluded that the majority confused the distinction between severance payments that are in addition to—and therefore, semantically, a supplement to—salary earned by a departing employee with payments that are intended to compensate for government service. Only the latter are proscribed by 18 U.S.C. § 209. *Id.* at 14a. Judge Hall further noted, in citing to the district court's findings, that although prospective factors were used in calculating the amount of the severance payments, the person at Boeing who made the ultimate decision regarding the payments was not aware of the specific formula used and approved the final severance payments based on his assessment of what was reasonable and fair to the departing employee. *Id.*

Following the court's decision, the Fourth Circuit denied petitions for rehearing and suggestions for rehearing *en banc*. This denial was by a six to five vote, with Judges Russell, Widener, Hall, Chapman and Wilkins dissenting. Pet., App. C, 30a, 31a.

SUMMARY OF ARGUMENT

This case raises fundamental issues relating to the meaning of 18 U.S.C. § 209 and the standards governing civil actions predicated on that statute and other criminal conflict of interest statutes. The errors

of law committed by the Fourth Circuit not only conflict with existing precedent, they effectively outlaw severance payments to potential government employees under any circumstance. This result, as Judge Hall observed in dissent, has "advanced a much more restrictive policy than Congress ever intended." Pet., App. A, 15a.

In reversing the trial court's factual finding on Boeing's intent, the court of appeals effectively eliminated the intent requirement from § 209. The court held that the intent to compensate for government service is a prerequisite to liability under § 209 and rejected the government's argument that the statute sets forth an objective standard of conduct which does not include intent. The court, nonetheless, rendered this conclusion meaningless by rejecting the substantial testimony on this issue and inferring intent from the mere fact of payment. In effect, the majority ignored its own holding and applied a wholly objective standard of conduct while claiming it was doing otherwise.

The court of appeals also exceeded its authority under Rule 52(a) in reversing the district court's finding on Boeing's intent. Rule 52(a) prohibits an appellate court from engaging in a *de novo* review of factual issues. That is, however, exactly what the Fourth Circuit did in reversing the district court's finding that Boeing did not intend the severance payments as compensation for the individuals' government service. There is ample evidence in the record to support the district court's finding, including substantial testimonial evidence which the court of appeals completely disregarded. The court of appeals'

reversal is thus clear error under Rule 52(a) and *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

The court of appeals' analysis of other key issues is also flawed because the court failed to recognize the interplay between common law principles of tort and civil actions predicated on criminal statutes such as 18 U.S.C. § 209. The government's case against Boeing alleges a common law tort for inducing a breach of fiduciary duty by the individual petitioners. Under basic principles of tort, the government cannot recover damages without proving injury—in this case, presumably some manner of a conflict of interest.

The court of appeals implicitly acknowledged that the severance payments did not create an actual conflict of interest, but nevertheless presumed injury from the mere fact of the payments. Such presumption is clearly improper because a severance payment, by itself, does not constitute an injury to the United States. Moreover, any presumption of injury in this case was completely rebutted at trial because the government stipulated and the district court found that the individuals performed their public duties "without bias and with independence and impartiality" and that Boeing never asked for nor received preferential treatment as a result of the severance payments. Thus, the court's ruling effectively creates an irrebuttable presumption that all severance payments harm the government. This result is contrary to the purpose underlying § 209 and to accepted principles of tort law.

The court of appeals made a similar error in its holding that secrecy or nondisclosure is not an element of a civil action predicated on § 209. This element, which derives from the common law of agency,

has previously been held to apply in every other civil action predicated on other criminal conflict of interest statutes. By rejecting the application of agency principles in this context, the court of appeals has not only deviated from existing precedent, it has created a separate standard for civil liability under § 209. This standard is clearly inappropriate because it expands—without justification—the scope of liability under § 209 beyond that of the other conflict of interest laws.

The net result of the Fourth Circuit's decision is a prohibition against all severance payments to potential government employees. This result is contrary to the interests of the government, the policies of the Defense Department, and the intent of Congress which, in enacting § 209, "recognized that a balance must be struck in order to encourage private industry's best minds to enter the public sector." Pet., App. A, 15a (Hall, J., dissenting).

ARGUMENT

I. The Fourth Circuit Effectively Eliminated The Intent Requirement Of § 209 And Misconstrued The Clearly Erroneous Standard By Reversing The District Court's Finding That Boeing Lacked Compensatory Intent.

Although the Fourth Circuit held that § 209 requires "compensatory intent," the court effectively eliminated that requirement in reversing the district court's factual finding that Boeing did not intend the payments as compensation for government service. The government argued that § 209 sets forth an objective standard of conduct that does not require intent. The court of appeals rejected that argument and held that the statute requires that payments be in-

tended "as compensation for" government service. Pet., App. A, 7a. Despite this holding, the majority applied an objective standard of conduct in concluding that the district court's finding that Boeing did not intend the severance payments as compensation for government service was clearly erroneous. Pet., App. A, 8a.

The majority's analysis on the issue of intent completely distorts the requirements of § 209. The majority concluded that the severance payments were made with the "compensatory intent" necessary to violate § 209 because the factual circumstance surrounding the severance payments "suggests" that Boeing intended "to supplement the federal salaries" of its former employees. Pet., App. A, 8a. This analysis simply does not square with the requirements of § 209.

Section 209's predecessor, 18 U.S.C. § 1914, was designed to prohibit private employers from paying the salaries—or compensation in the nature of salaries—of government employees. Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 2nd Sess., 118-20 (1960), *reprinted in* 1960 U.S. Code Cong. & Admin. News 738-40. Section 1914 prohibited government employees from receiving "any salary in connection with" their government service from "any source other than the Government of the United States."[8] The specific

[8] In an entirely different context, this Court has construed the term "salary," as used in a federal statute, to mean "a fixed annual or periodical payment for services" *Benedict v. United States*, 176 U.S. 357, 360 (1900). Although this definition may not be dispositive of the use of the term in § 209, it is clear

situation that triggered the enactment of § 1914 was the Bureau of Education's practice of hiring, at a nominal salary of $1.00 per year, employees whose real salaries were paid by private sources, such as universities or the Rockefeller or Carnegie Foundations. *Id.* at 118-19. In the words of a former Attorney General, "no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the United States." 33 Op. A.G. 273, 275 (1922). A recipient of a severance payment, however, serves successive masters not two masters simultaneously.[9]

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that regular periodic or incremental salary payments were at the heart of the evil § 1914 was enacted to address. Unlike a pre-employment lump-sum severance payment, periodic salary supplements might reasonably influence the receiving employee to tailor his government services to assure his continued receipt of salary. Severance payments simply do not have this attribute because once paid, the recipient does not look to the payor for anything.

[9] The severance payments at issue were paid and received *prior* to the individuals entering government service not during their government service. Since § 209 addresses payments to anyone "as an officer or employee . . .of the United States Government," the statute does not on its face appear to apply to severance payments made before the recipient is a government employee. When Congress enacted § 209 in 1962, it also enacted other conflict of interest statutes. The bribery statute, 18 U.S.C. § 201(b)(1) is intended to cover a "public official *or person who has been . . .selected to be a public official*." (emphasis added). Similarly 18 U.S.C. §§ 203 and 204 apply their prohibitions to "a Member of Congress, Member of Congress Elect." Reading these statutes *in pari materia* compels the conclusion that Congress intended § 209 to apply to an officer or employee of the United States not a person who may become an officer or employee.

In 1962, Congress replaced § 1914 with § 20
though Congress intended § 209 to reenact "i
stance" § 1914, Congress replaced the phra
connection with" government service with "a
pensation for" government service. The purp
this change was "to emphasize the intent th
prohibition is against private payment *made ex*
for services rendered to the Government." H.R
No. 748, 87th Cong. 1st Sess. 24-25 (1962).
under the plain language of the statute, as Judg
recognized in dissent, a payment does not
§ 209 unless it *both* supplements salary *and*
tended as compensation for the employee's g
ment services. Pet., App. A, 14a.

Any severance payment can be characterize
"supplement" to future income of an individu
cause it is necessarily available to be spent at
future time. The court of appeals, however, in
intent from the mere fact of payment, without
ingfully addressing whether the payments we
tended to compensate for government service
unwarranted inference is tantamount to an irr
able presumption that all severance paymen
"supplements" to future income constitute co
sation for government services. As Judge Ha
served, "the majority fail[ed] to articulate a disti
between payments intended as compensatio
those which are not." Pet., App. A, 14a. Be
§ 209 is a criminal statute, it demands that th
uisite intent be proven and not, as the majori
done, presumed from the fact of the severanc
ment alone.

In reversing the district court's finding on i
the Fourth Circuit also exceeded its authority

Rule 52(a). The issue of intent is wholly a factual question and is subject to review only under the clearly erroneous standard of Fed. R. Civ. P. 52(a). *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Under this standard, an appellate court may not duplicate the role of the trial court by deciding factual issues *de novo*: "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them *cannot* be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574-75 (emphasis added). *See also Davis v. Food Lion*, 792 F.2d 1274, 1277 (4th Cir. 1986).

These restrictions apply even when the trial court's findings are based on documentary evidence rather than the credibility of witnesses. However, when findings are also based on credibility determinations, as is the case here, "Rule 52(a) demands even greater deference to the trial court's findings." *Bessemer City*, 470 U.S. at 575.

The court of appeals acknowledged that the district court's finding "was based largely on statements by the individual defendants and others at Boeing," but reversed based on "other evidence in the record." Pet., App. A, 8a. This "other evidence" consists solely of inferences drawn by the court of appeals, but rejected by the district court, from the circumstances surrounding the severance payments and Boeing's severance pay practice generally.

The court of appeals found that: (1) "the payments were calculated in large part based on the financial impact of moving from Boeing to the government"; (2) "Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment"; (3) Boeing had "the parallel practice of providing paid leave for state and local service"; and (4) "in twenty-five years only twenty-one such payments were made, and only to those entering high level government service." After reviewing these facts, the court of appeals stated that "[v]iewing all of the evidence, we find that the five payments here were made with compensatory intent, and that the trial court's finding of no such intent was clearly erroneous." Pet., App. A, 8a-9a.

This analysis, by its own terms, constitutes a reweighing of evidence contrary to the requirements of Rule 52(a). Here, the district court relied on credible testimonial evidence of Boeing witnesses, the individual defendants and Defense Department officials in its finding that Boeing lacked compensatory intent notwithstanding the inferences the government had argued should have been drawn from these circumstances. In adopting the government's inferences, the majority never even addressed the substantial body of evidence upon which the district court had based its opinion.

Representatives of Boeing and each of the individuals testified that they did not intend nor understand the severance payments to be supplements to salaries as compensation for government service. Rather, Boeing intended and the individuals understood that the purpose of the payments was to sever all em-

ployment and financial ties to avoid any conflict of interest. JA 78, 45, 304-305, 59-60, 483-84, 531, 172, 186-87, 204-205 (CA JA 424, 443, 668, 399-400, 817-18, 954, 1034, 1044, 1057). At trial, the district court heard testimony from defendants Melvyn Paisley and T.K. Jones and had before it the depositions of Charles P. Hagberg, H.K. Hebeler, T.A. Wilson, S.M. Little, Jr., Mark K. Miller, defendants Harold Kitson, Jr. and Lawrence Crandon. The testimony on the issue of intent was uniform, and the United States failed to present a single word of rebuttal at trial.

The majority, however, dismissed this evidence without discussion despite the deference that Rule 52 requires it be given on review, choosing instead to substitute its own judgment based on the questionable inferences it drew from other evidence. The majority's failure to consider this testimony not only disregards the district court's evaluation of its credibility, but potentially establishes a rule of law that eliminates consideration of subjective intent or other issues that necessarily turn on testimonial evidence.

Moreover, the majority selectively disregarded other compelling facts that specifically negate the inferences that it drew from the "other evidence." As Judge Hall pointed out in dissent, Pet., App. A, 14a, the majority placed undue emphasis on the fact that the severance payments were calculated "in large part based on the financial impact of moving from Boeing to the government." Pet., App. A, 8a.

The record shows that although the preliminary calculations were in part based on this consideration, they were also based on the individuals' past services to Boeing and their lost employment benefits. JA 45, 309, 345-46 (CA JA 442, 685, 743). Moreover, the

current salary levels used in computing preliminary figures, as the district court observed, reflected the employees' past contributions to Boeing. Pet., App. B, 26a; JA 443-44 (CA JA 577).

Finally, the record shows and the district court found that "[t]hose responsible for the ultimate decision were not aware of the specific calculation method . . . and approved severance payments to the individual defendants based on their determination that the proposed payment was reasonable and fair to the departing employee." Pet., App. B, 20a, ¶ 20. The majority's reliance on the method of calculating the severance payments to support its ruling on Boeing's intent is thus entirely misguided.[10]

Other factors also negate the inferences drawn by the majority. Although the majority is correct that "Boeing's stated purpose in making the payments was to encourage public service," it does not necessarily follow that Boeing intended the payments "as compensation for government service." Pet., App. A, 8a.

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[10] Using the method of calculating severance payments as the sole yardstick to determine intent under § 209 also illogically elevates form over substance. Under the majority's reasoning, Boeing could have paid Mr. Jones $20,000 a year for each of his 25 years of service to the Company and the $500,000 would not create a conflict of interest, whereas the $132,000 that he received does. Although the higher figure may bear no logical relationship to the employee's contribution to the Company or the financial loss incurred as a result of his acceptance of federal employment, the severance payment would nevertheless be permissible under § 209. This result is arbitrary, suggesting that the statute has nothing to do with conflicts of interest. For the statute to have meaning, the intent of the parties, not the method of calculation, must be the key to determining the propriety of the payments.

To the contrary, the record shows and the district court found that the payments "provided a mechanism to completely sever all financial ties between Boeing and the departing employee" to avoid a conflict of interest. Pet., App. B, 17a, 21a, ¶¶ 5, 25.

The majority also overlooks the record evidence and the district court's finding that the severance payments "were not contingent upon the individuals entering into federal government service, the position assumed in the federal government, the agency served in the federal government, their remaining in government service for any stated period of time, or their returning to Boeing at any time in the future. Once the individual separated from the Company, the severance payment was his unconditionally, no matter what he did in the future." Pet., App. B, 19a; JA 46, 453-56, 338, 297, 322 (CA JA 443, 585-87, 636-37, 652, 732). The unconditional and irrevocable nature of the severance payments negates any inference that the individuals were on "paid leave" from Boeing or that the payments were intended as compensation for government service.

Finally, the majority ignores the fact that over the past 20 years Boeing has repeatedly disclosed its severance pay practice to the government and included the payments in its overhead accounts. Similarly, the individuals timely disclosed their receipt of the severance payments to the appropriate government officials. Pet., App. B, 21a, 22a, 27a. If Boeing or the individuals had intended the payments to compensate for government service, they certainly would not have made the payments known to the government.

In sum, there is substantial record evidence that supports the district court's finding that Boeing did

not intend to compensate the individuals for government service. The majority's reliance on inferences drawn from "other evidence" to reverse this finding constitutes a reweighing of selective parts of the record in violation of the standard of review of Rule 52(a). The result is a serious injustice in this case, and a ruling that will thwart the public interest in severance payments that are free from any improper intent.

II. Injury To The Government Cannot Be Presumed From The Mere Fact Of A Severance Payment to Support A Tort Claim Under 18 U.S.C. § 209.

The court of appeals' legal analysis misapprehends the nature of the government's case against Boeing. The government's claim is not a statutory criminal action under § 209. It is a federal common law tort action for inducing a breach of fiduciary duty under the common law or a duty as derived from § 209. Accordingly, the case is governed not only by the construction of § 209, but also by common law tort principles. *See Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct. Cl. 1975).

It is axiomatic that in the absence of injury, there can be no recovery in tort. It is also axiomatic that in the context of a tort action predicated on a criminal conflict of interest statute, the government's injury arises from some type of conflict of interest. In this case, the district court found that the severance "payments created neither the appearance of nor an actual conflict of interest [because] [n]one of the individual defendants were in a position in the government to provide preferential treatment to Boeing and in fact none of the individual defendants rendered preferential treatment to Boeing while a government em-

ployee." Pet., App. B, 26a. Accordingly, the district court held that the government was "not entitled to recover damages" because it "in fact suffered no harm." *Id.* at 27a.

The court of appeals reversed this holding and concluded, without explanation, that the severance payments did create the appearance of a conflict of interest. According to the majority, an appearance of a conflict of interest is sufficient injury to sustain tort liability: "The appearance of large payments by a defense contractor to key Defense Department employees is enough; there is no need to show an actual conflict, much less actual corruption." Pet., App. A, 9a.

The court of appeals, however, misread the conflict of interest cases it cites in concluding that any of them holds that an appearance of conflict of interest constitutes the fact of injury in a tort claim. In each of the cases cited by the court of appeals,[11] as well as other cases,[12] the facts demonstrated that an actual

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[11] *Continental Management, Inc. v. United States*, 527 F.2d 613 (Cl. Ct. 1975) (bribery case); *United States States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) (Negotiating a contract on behalf of government with company in which negotiator held an economic interest); *United States v. Kearns*, 595 F.2d 729 (D.C. Cir. 1978) (Eximbank official's sale of stock to bank client at inflated price); *United States v. Kenealy*, 646 F.2d 699 (1st Cir. 1981) (FHA appraiser's acquisition of properties prior to their appraisal by FHA).

[12] *United States v. Carter*, 217 U.S. 286 (1910) (bid-rigging case); *United States v. Drisko*, 303 F. Supp. 858 (E.D. Va. 1969) (Agriculture official's receipt of gifts from company in exchange for assisting company in relationship with Department of Agriculture); *United States v. Podell*, 572 F.2d 31 (2d Cir. 1978)

conflict of interest was inherent and inevitable. When an actual conflict of interest was palpable—as in the acceptance of a bribe, use of one's government position to obtain a personal benefit, or holding an economic interest adverse to the United States—courts have not required the government to prove that a particular decision or action was corrupt or dishonest. Where an actual conflict of interest exists, it may be appropriate to presume the fact of injury even without demonstrating actual corruption or a dishonest government decision. Accordingly, courts have generally not required that the government prove the nature of the injury to the United States or the precise measure of damages if the government can show an actual conflict of interest.

Those cases and the fact situations they present are in stark contrast to Boeing's conduct in the instant case. The court of appeals implicitly acknowledged that no actual conflict of interest existed, but, nonetheless, presumed injury to the United States solely from the fact of a severance payment itself. That presumption is wrong as a matter of law because there is no factual predicate from which injury can be presumed or inferred.[13] Boeing's severance pay-

(Congressman's receipt of fees from company in exchange for lobbying efforts relating to FAA proceeding); *United States v. Pezzello*, 474 F. Supp. 462 (N.D. Tex. 1979) (bribery case); *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964) (Federal poultry inspector's acceptance of consulting fees from private poultry company).

[13] Construing a criminal statute like § 209 to impose liability for conduct that creates only the appearance of a conflict of interest rather than an actual conflict would render the statute unconstitutionally vague under the principles of *Grayned v. City*

ments raise no more of a conflict of interest than do prior employment or other severance payments to which the government does not object.

In contrast, a bribe is invariably intended to exact conduct that conflicts with the recipient's duty to its principal, and, consequently, by definition will always cause a conflict of interest. Similarly, economic self-dealing that would violate 18 U.S.C. § 208 would inevitably constitute a conflict of interest, whether any individual decision or action was contrary to the interests of the United States. Examination of any of these cases demonstrates the manner in which they are distinguishable from this case.

For example, in *Continental Management*, a civil action based on 18 U.S.C. § 201, the court presumed injury from the fact of bribes paid to several government employees and imposed liability on both the

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of Rockford, 408 U.S. 104 (1972). A statute is void for vagueness if its prohibitions are not clearly defined because "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108. Moreover, vague laws are impermissible because they delegate policy matters "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 109.

The concept of an appearance of a conflict of interest is so inherently subjective that it necessarily lends itself to varying interpretations that are dependent on individual perceptions. Conduct that creates the appearance of a conflict in the eyes of one judge may seem entirely proper in the eyes of another. Indeed, at least one law that prohibited conduct creating "the appearance of a conflict of interest" has been held unconstitutional on vagueness grounds. *Keeffe v. Library of Congress*, 588 F. Supp. 778, 790-91 (D.D.C. 1984) (invalidating regulation under the Hatch Act.)

maker and recipients of the bribes. The court observed that proof of the bribe was sufficient to show the fact of injury because "the predicate for a non-statutory civil remedy [under § 201] is the probability that damage will flow from the giving of the bribe." 527 F.2d at 618. The court enumerated several generalized ways in which the bribe injured the United States and then detailed five specific acts of injury. The court noted, however, that a presumption of injury could be rebutted by proof that the government suffered no harm. *Id.* at 619 n.6.

The severance payments here in no way resemble the bribes in *Continental Management*. Unlike a bribe, there is no actual conflict of interest, no articulable injury and no "probability that damage will flow" from a lump-sum severance payment. Severance payments do not present an inherent conflict because they can, as here, be made for purely legitimate purposes without any expectation of future favors. Most lump-sum severance payments, such as the ones in this case, are made to sever relations not perpetuate them, and are made prior to government employment and, therefore, prior to the time the employee's government actions might be influenced by anticipation of a payment.

Presuming injury from a severance payment also does not advance the purpose of § 209 because severance payments simply do not fit within the analytical framework of the evil that Congress intended § 209 to address. Section 209 and its predecessor were designed to prohibit private employers from paying the salaries of government employees. Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 2nd Sess., 118-

20 (1960), *reprinted in* 1960 U.S. Code Cong. & Admin. News 738-40. The purpose of the statute is to prevent any bias or partiality that will likely arise if the employee is serving two masters, that is, if he is carried simultaneously on both the government and a private payroll.

Lump-sum severance payments made prior to government employment, however, do not create the potential for bias or divided loyalty that double compensation does. If an employee receives an irrevocable payment prior to government employment, he has no obligation or continuing incentive to render preferential treatment to his former employer because the government pays his salary, not the private employer. By contrast, if the private employer provides periodic payments to the employee during his government tenure, then the employee's loyalties may be divided because he is on the hook to his former employer for his next payment. In the latter instance, the presumption of injury may be appropriate because there may be a real conflict of interest and, therefore, a possibility, if not probability, that damage will flow to the government. A lump-sum severance payment, however, does not present such a danger because it does not automatically create an actual conflict of interest.

The court of appeals' holding is all the more improper because it not only presumes injury, it establishes an *irrebuttable* presumption of injury from the mere fact of a severance payment. The court presumed injury despite the government's stipulation that the severance payments did not cause an actual conflict of interest or actual corruption on the part of the individuals. The government stipulated or "did not

contest" the fact that Boeing did not receive preferential treatment as a result of the severance payments and that the superiors of each individual "were and are fully satisfied that [the individual] capably, faithfully and honorably performed his public duties without bias and with independence and impartiality." JA 22-42, 132-33, 139-40 (CA JA 333-39 ¶¶ 33, 50, 65, 84, 101, 104, 1007, 1012). Indeed, because the individuals disqualified themselves from Boeing-related matters, none was in a position to provide preferential treatment to Boeing. Pet., App. B, 21a-22a, ¶ 27; 27a. Presuming injury under these circumstances is not only inconsistent with *Continental Management*, it is inconsistent with common sense as well.

By creating an irrebuttable presumption that all severance payments injure the government, the court of appeals has eliminated any distinction between severance payments that violate § 209 and those that do not. Such a result apparently was not intended by the court of appeals itself and, certainly was not intended by Congress in enacting § 209. Pet., App. A, 7a, 15a.

III. The Fourth Circuit Erroneously Rejected The Law Of Agency In Holding That Secrecy Or Nondisclosure Cannot Negate A Conflict of Interest In A Civil Action Predicated On Section 209.

The analysis by the court of appeals majority of the effect of the petitioners' disclosures of the payments is also flawed. Under the common law of agency, an agent's receipt of payments, gifts or gratuities constitutes a breach of duty to the principal only if it is unknown to the principal. *See, e.g.*, *United States v. Carter*, 217 U.S. 286, 306 (1910); *Continental Management*, 527 F.2d at 617; *United States v.*

Kearns, 595 F.2d 729, 734 (D.C. Cir. 1978); *United States v. Drumm*, 329 F.2d 109, 113 (1st Cir. 1964). The rationale for this requirement is that a principal's injury arises only from "an agent's receipt of secret profits" because secret profits "necessarily create[] a conflict of interest and tend[] to subvert the agent's loyalty." *Continental Management*, 527 F.2d at 617. Although not all disclosures will negate a conflict, disclosures to the appropriate authorities may obviate a conflict of interest and therefore any injury to the principal. *See United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 560-61 (1961); *United States v. Kenealy*, 646 F.2d 699, 704 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981).

The court of appeals acknowledged this rule, Pet., App. A, 9a, but nevertheless refused to follow it. According to the majority, a civil action "based on a violation of the standards of § 209 . . . is not limited to secret compensation." Pet., App. A, 9a. In effect, the court of appeals held that the common law of agency—or the common law generally—does not apply to civil actions predicated on § 209. This holding is incorrect and contradicts the holding in virtually every other civil case decided under conflict of interest statutes.

The government's claims against Boeing and the individuals are not statutory claims under § 209. On the face of the complaint and by the government's admission, they are common law claims derived from the standards of § 209. JA 124-25, 272 (CA JA 1001, 1002, 1103, 1104). Because neither § 209 nor the other conflict of interest statutes specifically provides for a civil cause of action, the common law, in conjunction with the statutory standards, necessarily controls the

nature and extent of liability. Agency principles are particularly relevant because the government's claims are based on an agent's breach of loyalty or a third party's inducement of a breach. *See, e.g.*, *Mississippi Valley*, 364 U.S. at 548-550 & n.14; *Continental Management*, 527 F.2d at 617 n.3. In virtually every other civil case predicated on other conflict of interest statutes, courts have applied agency principles, including the rule that disclosure can vitiate a conflict of interest. *See, e.g.*, *United States v. Carter*, 217 U.S. at 306; *United States v. Kenealy*, 646 F.2d at 704; *United States v. Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978); *United States v. Drumm*, 329 F.2d 109, 113 (1st Cir. 1964); *United States v. Drisko*, 303 F. Supp. 858, 860 (E.D. Va. 1969).

By rejecting the application of agency principles in this case, the court of appeals has in effect created a new federal cause of action that deviates from existing precedent governing civil actions predicated on the conflict of interest statutes. This result not only challenges the integrity of this precedent, it potentially creates a separate rule for § 209 that expands the traditional scope of civil liability beyond that of other conflict of interest statutes.

The court's alternative holding does not cure the uncertainty created by its rejection of agency principles. The majority held that "even if secrecy or nondisclosure was an element here," the disclosures made by the individuals were insufficient to negate a potential conflict because the financial disclosure forms failed "to differentiate between ordinary and extraordinary payments." Pet., App. A, 9a. The record clearly shows, however, that the individuals completed the forms and aggregated their income

according to instructions issued by the Designated Agency Ethics Officials. Petitioners Jones and Paisley also disclosed their severance payments to attorneys in the offices of the General Counsel of the Defense Department and the Navy. Pet., App. B, 21a, ¶ 26; JA 471-72, 173-74, 212-13 (CA JA 806, 1035-36, 1062-63). These disclosures, contrary to the majority's holding, are sufficient to obviate any potential conflict of interest. *See United States v. Kenealy*, 646 F.2d at 704.

Moreover, the court of appeals ignored altogether the disclosures made by Boeing. In the past, Boeing consulted the general counsels of the recruiting agencies on at least three occasions to ensure that the appropriate government officials were aware of, and did not object to, the Company's severance pay practice. On each of these occasions, the general counsels for NASA, the Air Force and the Department of Defense did not object to the practice. On at least one occasion, the Department of Defense informed Boeing that a proposed severance payment was in compliance with the federal conflict of interest statutes. Pet., App. B, 18a, ¶¶ 7-8; JA 541-53 (CA JA 151-82).

The cumulative effect of the court of appeals' decision is that private employers and government employees may be subject to liability for the making and receipt of severance payments despite disclosure to the government and despite the government's approval of or acquiescence in them. Such a result is directly at odds with the common law of agency, principles of estoppel, and the stated legislative purpose of § 209. *See* Pet., App. A, 15a.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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